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Regulating Immigration Control: Carrier Sanctions in the Netherlands¹

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Abstract

This article attempts to put carrier sanctions policies in a broad perspective by looking at the immigration context, the rationale behind the policy, the changing character of borders and the regulatory environment of this policy. Carrier sanction legislation can be understood as a remote control instrument, which is supplementary to controls before and at the border and internal controls, whereby the concept of the border as a line between states is abandoned. The second part of the article focuses on the implementation of the carrier sanctions policy in the Netherlands. The Dutch government tries to overcome the principal-agent dilemma arising from involving a third party in enforcement, by installing a system of 'contiguous measures', both negative and positive, to stimulate carriers to perform controls on their passengers' documents. Responsibilities are imposed on carriers but the state, by using 'soft' and 'hard touch' legislation, remains in control.

Keywords

carrier sanctions; borders; third-party liability; contiguous measures; regulation

Affidavit of the Master or Commanding Officer, or First or Second Officer

I, O. Cüppers, Master of the '*Kaiser Wilhelm II*' from Bremen, do solemnly sincerely, and truly swear that I have caused the surgeon of said vessel sailing therewith or the surgeon employed by the owners thereof, to make a physical and oral examination of each and all of the aliens named in the foregoing Lists or Manifest Sheets, 30 in number, and that from the report of said surgeon and from my own investigation, I believe that no one of the said aliens is an idiot, or imbecile, or a feeble-minded person, or insane person, or a pauper, or is likely to become a public charge, or is afflicted with tuberculosis or with a loathsome or dangerous contagious disease, or is a person who has been convicted of, or who admits having committed a felony or other crime or misdemeanour involving moral turpitude, or is a polygamist or one admitting belief in the practice of polygamy, or an anarchist, or under promise or agreement, express or implied, to perform labor in the United States, or a prostitute, or a woman or girl coming to the United States for the purpose of prostitution, or for any other immoral purpose, and that also, according to the best of my knowledge and belief, the information in said Lists or Manifests concerning each of said aliens named therein is correct and true in every respect. O. Cüppers, Commanding Officer

Sworn lo before me this third day of July, 1907, at New York
R.S. Biglin, Immigration Officer.²

¹⁾ This article falls within CHALLENGE – The Changing Landscape of European Liberty and Security – a research project funded by the Sixth Framework Programme of the European Commission's Directorate-General for Research (www.libertysecurity.org).

²⁾ Affidavit from the Master of the '*Kaiser Wilhelm II*' arriving in New York on 3 July 1907. Retrieved from the Ellis Island website, last visited 11 February 2008, www.ellisland.org.

1. Introduction

Ever since nation states have started to control and regulate migration, governments have tried to share this difficult task with private organisations and semi-public bodies. This article focuses on the way in which private transporters have become involved in the process of migration control.

The affidavit above illustrates that the involvement of carriers in immigration control has not been a recent development. Already in the nineteenth century, the US government introduced legislation intended to restrain shipping companies from transporting passengers who, because of ill (mental) health or immoral intentions, were considered undesired immigrants. This induced transatlantic shipping companies to perform immigration controls prior to embarkation.³ This example shows that in immigration control the sharing of migration control tasks between government agencies, semi-public bodies and private companies was not uncommon.

During the past decades, controlling migration flows has become an increasingly important political issue in western European countries. Especially controlling 'illegal' or 'undocumented' immigration is prioritised. According to Tholen, it seems that nowadays migration and security is all that Europe is about.⁴ The importance of immigration control as a political issue grew in the 1980s when the number of immigrants and asylum-seekers travelling to western Europe, rapidly increased, a growing number of whom was from outside Europe and not in possession of the necessary travel documents. In response, governments introduced tougher immigration control mechanisms designed to check the flow of immigrants and, specifically, asylum-seekers.⁵ One of these measures was the introduction of *carrier sanctions legislation* whereby a fine can be imposed on carriers who transport passengers who are not in possession of the required travel documents.⁶

This policy was not just developed nationally but also in cooperation between EU Member States. In 1990 the obligation to sanction carriers was included in the Schengen Implementing Convention; in 2001 an EU Directive was adopted, harmonising the financial penalties for carriers. The latest developments have been the adoption of an EC Directive in 2004, forcing carriers to gather Advanced Passenger Information (API) data and forward them to immigration authorities of the country of destination before departure,⁷ and the proposal of the European Commission to have air carriers gather and forward to the authorities, Personal

³ Zolberg 1999 and 2003; Wilmink 1893; De Marez Oyens 1886.

⁴ Tholen 2005.

⁵ Feller 1989, p. 50.

⁶ For an overview of carrier sanctions policies in Europe, see Cruz 1995.

⁷ EC Directives 2001/51/EC, OJ L 187, 10.7.2001, p. 45 and 2004/82/EC, OJ L 261, 6.8.2004, p. 24.

Name Record (PNR) data of passengers flying to and from the EU.⁸ Through this increasingly strict legislation, private carriers have been compelled to check documents, to gather and forward passenger data and to refuse to transport undocumented or not adequately documented passengers. Transport companies and their staff have traditionally been one of the main targets for sharing the burden of migration control, and through the policy of carrier liability, private transporters are forced more and more to assume responsibility for the admissibility of the passengers they intend to transport.

There has been a trend towards privatisation, de-regulation and self-regulation in various branches of business in the past twenty years, accompanied by an increasing focus in literature and research on changes from ‘command and control’ regulatory models, to regulatory models where the State is no longer ‘rowing’ but ‘steering’.⁹ This development toward involving non-State actors in different areas of enforcement can be interpreted as part of a more general transformation of government taking place in contemporary societies in the last thirty years, where a centralized top-down system of State control has moved to a system of de-centred networks of governance.¹⁰ In these de-centred networks, public and private actors are involved in both formal and informal practices aimed at reaching policy goals.

In this article, we will focus on the carrier sanctions policy and explore how it can be seen from a regulatory perspective. In the case of carrier sanctions, a private actor is involved in a process that has always been central to State control: immigration control. The involvement of transporters in immigration control cannot be solely attributed to a transformation of government to governance – as we have seen, private carriers have been involved in migration control for more than two centuries. However, it is not unlikely that the present carrier sanctions policy and its development in the past decades have been influenced by this shift towards governance. Can we discern a move away from command and control models of regulation towards forms of governance in this area?

In the first part of the article, we will pay attention to the developing carrier sanctions policy in a broader context: the context of immigration control. In the second part, we will discuss implementing measures concerning carrier sanctions

⁸) COM (2007)654, final, 6 November 2007. PNR (Passenger Name Record) data is more extensive than API (Advanced Passenger Information). API normally contains information from the machine readable zone (MRZ) of a passport: name, passport number, nationality, date of birth in combination with flight details: place of entry into EU, plane code, departure and arrival time, number of passengers and point of embarkation. PNR data can also encompass for example credit card details, meal preferences, medical data, etc. The aim of Directive 2004/82/EC was to fight illegal immigration whereas the new proposal of the Commission is aimed at the fight against terrorism and organized crime.

⁹) Ayling and Grabosky 2006.

¹⁰) Van Kersbergen en Van Waarden 2004; Mazerolle and Ransley 2005.

in the Netherlands. We will thereby focus on the way in which the Dutch government tries to overcome principal-agent problems and make carriers comply with their imposed responsibilities.

2. The ‘Why’ of Carrier Sanctions

The first question that arises when looking at carrier sanctions policies is: *why* are governments forcing responsibilities concerning migration control onto private parties? This question is all the more interesting since immigration control has always been a core aspect of State sovereignty. Torpey has shown how gaining control over movement has been essential in building nation States and how States have gradually “stripped private entities of the power to authorize and forbid movement and gathered that power unto them selves”.¹¹ This “monopolisation of the legitimate means of movement” by States also meant that they were successful in “determining who ‘belonged’ and who did not”.¹² Yet, contrary to this monopolisation, in the case of migration, governments are delegating these core tasks and responsibilities concerning immigration control to private actors. As a result of the developing carrier sanctions regime, airline personnel have in fact been forced to take over certain tasks from immigration officers and have become the ‘sheriff’s deputies’, they are executing immigration controls on behest of the State.¹³

2.1 *Controlling Immigration: Loss of Control?*

In the debate concerning migration, there has been a lot of discussion on the question whether or not States have lost control over immigration. Some scholars argue that States have almost never succeeded in managing migration thus far.¹⁴ Cornelius et al. have argued that there is a “limited effectiveness of most attempts by governments [...] to intervene in the migration process linking them to Third World labour exporting countries”.¹⁵ Also Cornelius and Salehyan argue that the United States are losing control in trying to control ‘unwanted’ immigration through strict border control measures and that alternative approaches such as labour market policies may have more effect than stricter border controls.¹⁶ However, with regard to labour migration policies, De Lange found that the Dutch authorities mostly failed in regulating labour migration over the last 60 years, and

¹¹ Torpey 2000, p. 8.

¹² Torpey 2000, p. 20.

¹³ Torpey 2000, p. 9.

¹⁴ Van Amersfoort 1996.

¹⁵ Cornelius et al. 2004.

¹⁶ Cornelius 2005; Cornelius and Salehyan 2007.

have in that same period lost control over the regulation of labour migration to the EU.¹⁷ According to Sassen, governments have lost control over immigration under the influence of globalisation.¹⁸

Andreas argues that far from disappearing, many borders are being reasserted and remade through ambitious and innovative State efforts to regulate the transnational movement of people.¹⁹ Instead of a loss of sovereignty, Andreas says, European border controls reflect a multilateral ‘pooling of sovereignty’.²⁰ Also Geddes states that through EU cooperation and integration States have consolidated and reasserted their ability to regulate international migration.²¹ Dauvergne even argues that control over the movement of people has become the last bastion of sovereignty, although she does not suggest that States are also always effective in their migration control.²²

In many of these debates, the terms sovereignty and control are used, sometimes meaning in essence the same: since effective controls, and therefore the ability to determine who is allowed access to the territory and who is not, can be argued to be central to a State’s sovereignty, the concepts of control and sovereignty are linked. Sassen for example states that the mere existence of undocumented immigrants signifies an erosion of sovereignty.²³ Dauvergne agrees, saying that “illegal immigration is an affront to sovereignty because it is evidence that a nation is not in control of its borders”.²⁴

Guiraudon and Lahav also pay attention to the coherence between sovereignty and the ability to control immigration and argue that States may have surrendered a part of their sovereignty by sharing competences with other States in immigration control, but have done so to meet national policy goals, regaining sovereignty in another sense: capability to rule.²⁵ An example is the way Member States until May 2004 could initiate an EC Directive. France for example initiated the Directive on the harmonisation of carrier sanctions;²⁶ this way it could use European cooperation to try to improve its control over immigration. Member States have also used the European level to see their national wishes concerning migration fulfilled. For example, the Dutch Government wanted to introduce penalties for carriers but was always met with resistance in Dutch Parliament.

¹⁷ De Lange 2007, p. 401.

¹⁸ Sassen 1996.

¹⁹ Andreas 2000, p. 2.

²⁰ Andreas 2000, p. 3.

²¹ Geddes 2001.

²² Dauvergne 2004.

²³ Sassen 1996, p. 64.

²⁴ Dauvergne 2004, p. 598. It may be questioned whether, in general, governments expect their legislation to be ‘foolproof’. It seems that issues relating to immigration policy are more complicated. When immigration laws are not foolproof it is taken as evidence of failing sovereignty.

²⁵ Guiraudon and Lahav 2000, p. 164.

²⁶ 2001/51/EC OJ L 187, 10.7.2001, p. 45.

Through the implementation of the Schengen Implementing Convention however – in which negotiations the Dutch were also involved – the Dutch government could finally introduce a system of carrier sanctions. These examples support Geddes' argument that European cooperation and integration have helped Member States consolidate and reassert their ability to regulate international migration through the use of new EU-level institutional venues.²⁷

There are different views on whether or not the State has lost control. There seems to be little agreement on the issue. It is not always clear to what kind of migration authors are referring: labour migration, irregular migration or otherwise? In this case, we would like to refer to Freeman who argues that the view that States are losing control is unwarranted, and that migration should be disaggregated to avoid undisciplined speculation.²⁸ In this paper, the focus is on the control of undesirable migration – in the sense of undocumented arrivals – through the use of carrier sanctions.

2.2 *Delegating Immigration Control to Private Actors*

Whether or not States are able to control their borders, it is clear that they try to do so vigorously. The inclusion of carriers in immigration control is an attempt to control unwanted immigration. Lavenex describes how European policies have focused on the repression of undesirable immigration flows by externalising controls, instead of addressing the factors that lead people to leave their countries of origin through a preventive comprehensive approach. She states that the locus of control has shifted further away from the physical border and has become 'remote control',²⁹ mainly through coordinating visa policies in the Schengen group, by installing carriers' liability regimes and by placing liaison officers at airports in countries of origin to check that documents are thoroughly examined.³⁰ According to Guiraudon, the passing of tasks from government to other actors constitutes a 'de-nationalization' of immigration control. Guiraudon and Lahav distinguish between different forms of 'shifting' of competence and responsibilities away from the State; shifting up (e.g. to EU level), down (e.g. to regional level) and out (to private actors).³¹

Limiting Costs and Increasing Efficiency

In answering the question why governments are prepared to delegate their responsibilities in the area of migration control, it can be helpful to look at privatisation

²⁷) Geddes 2001, p. 21.

²⁸) Freeman 1994, p. 17.

²⁹) Lavenex 2006; see for the use of 'remote control' Zolberg 2003, also Guiraudon 2001 and 2002, Guiraudon and Lahav 2000.

³⁰) Lavenex 2006, p. 334.

³¹) Guiraudon and Lahav 2000; see also Guiraudon 2001.

in immigration control from a costs-benefits point of view. In the case of controlling the entrance of undocumented passengers, bounded rationality, together with a complex environment makes it difficult for governments to ensure that no ‘unwanted’ immigrants gain access to their territories. Therefore, governments co-opt private transport companies to help them deter wrongdoers (more) effectively. Following an economic reasoning, actors (in this case government) will choose to delegate tasks if this will result in higher efficiency and lower costs.³² By ‘privatising’ control tasks to private transporters, governments avoid having to employ and train staff to execute control functions abroad – if that would be at all possible seeing that this will severely affect a third State’s sovereignty. According to Ayling and Grabosky, the continuing development of the involvement of third party enforcement indicates that States recognise they cannot ‘do it alone’.³³

Also, by shifting control mechanisms to a private actor that operates *before* the physical border, the costs of accommodation, assessing asylum claims and expulsion can be reduced. Thus, by using a private transporter to execute part of the controls, governments have simultaneously ‘externalised’ part of the costs associated with migration control to private actors.³⁴ This does not mean there will be no costs for the State associated with this policy. As will be described in the second part of this paper, States invest in installing control mechanisms to assert that these duties are indeed performed by carriers.

Circumventing Constraints

As illustrated in the introduction, the involvement of private actors in migration control as such is not a new phenomenon. According to Guiraudon, the phenomenon itself might not be new, the way it is now used as a response to the constraints that migration control policy faces in a national setting is a novelty: immigration control through ‘remote control’ is now being used to “circumvent legal constraints absent in the early twentieth century”.³⁵ Consider, for example, the prohibition concerning *refoulement* which was introduced with the Geneva Convention relating to the Status of Refugees (1951). By preventing migration at the source and therefore by making sure that would-be asylum-seekers do not reach the territory of receiving countries, governments no longer have to refuse possible asylum-seekers and other migrants at the border. They no longer need to expel failed asylum claimants – with the risk of violating the prohibition of *refoulement* – they simply make sure that they cannot reach the border.

³²) Willamson 1981.

³³) Garland 1996, cited by Ayling and Grabosky 2006.

³⁴) Guiraudon and Lahav 2000.

³⁵) Guiraudon 2002, p. 195.

Lahav similarly argues that ‘shifting’ competences and responsibility and involving other actors such as carriers, has been governments’ strategy to “extend their realm of action and overcome certain constraints”.³⁶ By changing the gatekeepers to include private, local and international/supranational agents, governments have enlarged the ‘migration playing field’ and so have been able to “solve the control dilemma in ways that can at once appease public anxiety over migration and security, short-circuit judicial and normative constraints (by involving actors that are not bound by the international rules concerning human rights protection) and still promote trade and tourist flows”.³⁷ Thus, Guiraudon and Lahav argue western European States are adapting to constraints by adopting ‘remote control’ measures.³⁸

2.3 *From ‘Physical’ to ‘Metaphorical’ Borders*

Carrier sanctions’ measures should also be interpreted by analysing the changing character of border controls. As Lavenex argued, the locus of control has shifted further away from the physical border and has become ‘remote control’.³⁹

Carrier sanctions are not the only control mechanisms away from the actual ‘physical’ border, the old border line. When travelling to the European Union from a third country, travellers often find that the effective border of the European Union does not coincide with the geographical line around its territory. It is not the border patrols at the outer borders that one (at first) encounters.⁴⁰ On their way to an EU Member State, third country nationals will have to deal with various external and internal control dimensions. External controls being the more visible control mechanisms that States use to control entry before departure or arrival, through measures such as visa requirements and carrier sanctions, and internal controls – those control measures that may be exercised on non-nationals from their first entry into the territory to their naturalization.⁴¹

Before travelling to the European Union, nationals of many countries have to report to the consular representation of the country of destination to obtain a visa. This allows the immigration authorities of the country of destination to already perform checks whilst the traveller is still in his or her country of departure. Then, at different points in travelling, through different control mechanisms, this person on the move can be checked by various actors, positioned strategically, who ascertain if the migrant is admissible to the country of destination. This constitutes not only a territorial but also a temporal relocation of

³⁶⁾ Lahav 2003, p. 89.

³⁷⁾ Lahav 2003, p. 89.

³⁸⁾ Guiraudon and Lahav 2000.

³⁹⁾ Lavenex 2006.

⁴⁰⁾ Tholen 2005, p. 330.

⁴¹⁾ Brochmann 1999.

control. Externally, intelligence agencies, such as Immigration Liaison Officers, collect information on migratory flows, and share this information with other organisations. At the consular services, there will be physical contact with the migrant for the first time. Next are the controls executed by private transporters such as shipping companies or airlines, possibly advised by Immigration Liaison Officers, in pre-boarding checks. At the point of arrival, gate-checks can be executed directly after disembarking. Then, at the airport, the migrant can be checked by immigration authorities. Finally, there are internal controls in the country of destination to check that no unwanted immigrants remain on the territory. Examples are the requirement of residence and work permits and inspection of work sites, and wherever immigrants encounter welfare authorities etc. Thus, controls are not situated randomly; remote control is supplementary to controls at the borders and to internal controls in the receiving country. A system of border management has been developed where border control is de-territorialized, and the concept of the ‘physical border’ as a line between States is abandoned. As Brochmann has also described, internal and external controls constitute a continuum, with a different mix of internal and external controls in each country.

With the ‘externalisation’ and ‘de-territorialization’ of immigration control, governments have in fact distanced themselves – legally and geographically – from immigration control: control is no longer conducted in the country itself but from a distance, in the country of origin or transit. A consequence of moving border control away from the State is that controls and the way they are executed are no longer subject to democratic control mechanisms. It is, for example, not clear how many passengers are being refused by airlines. Various authors have raised questions concerning the lack of judicial remedies, democratic control and accountability.⁴² Salter even claims that the lack of judicial remedies – which *are* available in a face-to-face asylum claim – is an expression of the fact that “tactics [are used] rather than laws, and even (...) laws themselves [are used] as tactics”.⁴³ An example of the effects of moving borders can be found in the judgment on the *Roma Rights* case in the United Kingdom,⁴⁴ where one of the Law Lords argues that the claim

⁴² See for example Salter 2007; Den Boer 2004.

⁴³ Salter 2007.

⁴⁴ *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55. In 2001, the Czech Republic agreed that the UK could station immigration officers at Prague Airport to screen and possibly refuse passengers travelling to the UK. This practice was challenged as incompatible with the obligations of the UK under the Geneva Convention (1951) and Protocol (1967) relating to the Status of Refugees and under customary international law. The appellants also challenged the procedures as involving unjustifiable discrimination on racial grounds. On 9 December 2004, the UK House of Lords found the UK government to have discriminated under national legislation on racial grounds against Czech Roma in preventing them from travelling to the UK in order to stop them from claiming asylum upon arrival.

for asylum brought forward in this case failed since the asylum-seekers had not presented themselves at the frontier of the United Kingdom, save in a ‘highly metaphorical sense’.⁴⁵ One of the Law Lords thus made a clear distinction between physical and metaphorical borders. According to Kesby, this emphasis on the geographical border denies other more subtle forms of borders. Nowadays, borders are ‘ubiquitous’.⁴⁶

In policy documents, we also see this kind of ‘de-territorialization’ of the border used more and more explicitly. In 2003, the Dutch Advisory Committee on Aliens Affairs (ACVZ) strongly recommended that the Dutch Government adopt a strategy of border control shaped as concentric circles as an alternative to the ‘classic’ border control mechanisms.⁴⁷ Arranging mechanisms of border control as concentric circles has also been discussed in the context of the European Union’s policy to manage migration. The Austrian Presidency drafted a controversial *Strategy Paper on Immigration and Asylum Policy* in 1998 in which it proposed to replace the model of ‘fortress Europe’ with a model of ‘concentric circles’.⁴⁸ In this model of concentric circles, the EU constitutes the inner circle. The neighbouring countries were thought of as constituting the second circle that “should gradually be linked into a similar system which should be brought increasingly into line with the first circle’s standards (...)”.⁴⁹ A third circle of States – e.g. Turkey and North Africa – “will then concentrate primarily on transit checks and combating facilitator networks”.⁵⁰ Eliminating push factors was suggested as a task for countries forming the fourth circles: China, and countries in the Middle East and sub-Saharan Africa. Shaping border control in concentric circles would then mean that surrounding States would be transformed into ‘buffer zones’,⁵¹ either restricting migration to the inner circle by installing control mechanisms or by absorbing parts of the migratory flows. At the time the Austrian Delegation drafted this paper, the idea of forming concentric circles of control provoked a lot of resistance, although presently it seems to have become much more acceptable to policy makers. This concept mentioned in the Draft Strategy Paper is now replicated in the internal security regime and in the cooperation of the EU with third countries concerning asylum and migration.⁵² The EU Council of Ministers even talks of ‘external borders global management’

⁴⁵ Kesby 2007.

⁴⁶ Balibar 2002, cited in Kesby 2007.

⁴⁷ ACVZ 2003. The ACVZ is the Dutch committee that advises the Dutch Government on migration policy. This committee was established in accordance with Article 2 of the Aliens Act 2000.

⁴⁸ From the Presidency to the K4 Committee, Doc 9809/98, CK4, Brussels 1 July 1998, this confidential paper leaked in September 1998. A model of concentric circles is suggested under points 60 and 61.

⁴⁹ Doc 9809/98, CK4, Brussels 1 July 1998.

⁵⁰ Doc 9809/98, CK4, Brussels 1 July 1998.

⁵¹ Collinson 1996.

⁵² Lindstrøm 2005, p. 590.

which must contain measures and actions in third countries.⁵³ In the Hague Programme,⁵⁴ reference is also made to a ‘continuum of security measures’ concerning the management of migration flows and “for the prevention and control of crime, in particular terrorism.”⁵⁵

3. The ‘How’ of Carrier Sanctions

In the previous sections, we have provided a perspective on the reasoning behind the policy of carrier sanctions and on the context of immigration control. Based on reasons of cost reduction, higher efficiency and circumventing certain constraints, governments have delegated responsibilities concerning immigration controls to private carriers. Thereby, we have to take into consideration that this development has not taken place in a vacuum. The development of the ‘remote control’ instrument of carrier sanctions fits into the changing character of border controls in which circles of risk filters have been developed and placed strategically. It brings us to the question of *how* this policy is carried out. In answering this question, we will mainly focus on the relationship between carrier and government: are carriers victims, upon whom this policy is enforced by mechanisms of command and control or is there reciprocity in the relationship with room for negotiation on a more equal basis?

3.1 *Third Party Liability*

Systems of carrier sanctions are a way of involving a third party in enforcement. This kind of third party involvement, which is characterised by the fact that the private parties whose help is enlisted, are neither the primary authors, nor the (direct) beneficiaries of the misconduct they police, is referred to by Gilboy as a *third party liability system*. Such a liability system is in contrast to other forms of third party involvement in which third parties sometimes also stand to benefit from their cooperation with government.⁵⁶ In third party liability systems, third parties are used as ‘sheriffs’ deputies’ or as ‘cops on the beat’,⁵⁷ they are made responsible for certain tasks, while control remains with the State. According to Gilboy, we can discern third-party liability practices through three characteristics:

⁵³ Doc. 5174/03, 9 January 2003, p. 2.

⁵⁴ The Hague Programme: strengthening freedom, security and justice in the European Union. Annex 1 to the Presidency Conclusions of the Brussels European Council, November 2004.

⁵⁵ Doc. 16054/04, 13 December 2004, p. 16.

⁵⁶ Gilboy 1998, p. 135, citing Kraakman 1986.

⁵⁷ Torpey 2000, p. 9; Kraakman 1986, p. 53.

1. Private actors are compelled to help deter misconduct by others;
2. Civil and /or criminal sanctions exist in case the third party fails to perform its duties (it should be noted that the third party is sanctioned rather than the original trespasser):
3. Little or no compensation is provided to cover the costs of performing duties.

Third party liability is used not just in immigration control but in a variety of situations where misconduct cannot be detected except at great public cost. The help of private parties can vary from disclosing private information to law enforcers (cf. transfer of passenger data) to obstructing certain conduct (denying boarding to inadmissible passengers). Examples are the compulsory reporting of unusually high numbers of people with symptoms of infectious diseases by Dutch doctors, or the compulsory reporting of unusual transactions by banks and notaries but also by car dealers, antique sellers, etc. In immigration control the 'misconduct' is interpreted as undocumented or inadequately documented travellers, trying to access a State's territory without being in possession of a (valid) passport or visa. The fact that undocumented or inadequately documented passengers claim asylum has been identified by various governments as an abuse of the asylum system. Mazerolle and Ransley focus their research on the way in which third parties are involved in policing; they state that central to third party policing is the use of a range of civil, criminal and regulatory rules and laws, to encourage (or force) third parties into taking some crime control responsibility.⁵⁸

Ayling and Grabosky make a clear distinction between 'mandatory action' and 'mandatory reporting' in the involvement of third parties in what they call 'policing by command'. *Mandatory action* is where a third party is required by law to undertake certain actions in the advancement of law enforcement (for example, the checking of documents by carriers). *Mandatory reporting* is described as the requirement that a third party provides information on specific activities to law enforcement, or other regulatory agencies.⁵⁹ In the case of carrier liability, the State is coercing the carrier into taking mandatory action. And, due to new obligations for carriers in the EU, *air* carriers are now also responsible for gathering passenger data and forwarding these to their immigration authorities of the country of destination before departure. Carriers are thus obligated to act and report.

Carriers' position in the third party liability system in immigration control can be characterised as that of 'gatekeepers'. Gatekeepers are defined by Kraakman as third parties involved in enforcement because they are able to disrupt misconduct by *withholding their cooperation* from wrongdoers.⁶⁰ This is different than, for instance, imposing liability on third parties to 'blow the whistle' on wrongdoers

⁵⁸) Mazerolle and Ransley 2005, p. 3.

⁵⁹) Ayling and Grabosky 2006, p. 423.

⁶⁰) Kraakman 1986.

or discharge or otherwise punish wrongdoers. In this case, the withholding of cooperation is the refusal to transport a passenger when the carrier suspects that that passenger might be refused entry into the country of destination.

Some private entities are especially well suited to deter lawbreaking behaviour; since they have ‘access’ to the misconduct they are asked to prevent, they may be considered as ‘key access points’ to it.⁶¹ This is certainly the case with international carriers: they have a powerful position in preventing undocumented passengers from boarding the carrier, and thus have a powerful position in preventing the ‘misconduct’. Furthermore, carriers play a role in facilitating the law-breaking behaviour; they will prefer to sell as many seats as possible on a plane or boat. Therefore, carriers are not only essential to detection and control of law-breaking behaviour, but can at the same time facilitate such behaviour.⁶²

By shifting tasks to private actors operating before the border, the relationship between government and carriers is fundamentally affected. Carriers have not been anxious to assume the control tasks of immigration authorities, as will be illustrated by several court cases on this issue in the Netherlands. As commercial transporters, their objective is to transport as many travellers as possible in a way that is most cost efficient. Being made responsible for checking their passengers’ documents, has meant an obligation for carriers to invest in training of employees, and possibly the hiring of extra staff. Moreover, one of the consequences is the refusal of those passengers not in possession of the required documents. Through the carriers’ liability regime, the passenger is actually transformed into a potential economic risk to the carrier, one which the carrier will want to diminish as much as possible. Under threat of considerable financial sanctions, carriers have reluctantly agreed to assume the imposed role of immigration officers.⁶³

Despite the carrier’s reluctance, immigration authorities will try to make sure that carriers do comply with their policy. Governments insist that it is important to control their borders and especially to prevent illegal immigration. The carrier’s position is very different from the State’s in this third-party liability system. Carriers have no interest – apart from avoiding liability – in refusing passengers who do not possess proper travel documents. This presents governments with a principal-agent problem: how can the government (principal) ensure that the carrier (agent) complies with its goals?⁶⁴ In the case of carrier liability, private carriers are obliged by law to perform control duties. States have tried through (economic) coercion, to convince carriers to perform these with diligence. With sanctions, the State hopes to influence the private party’s motives and interests through reducing the expected value of non-compliance.⁶⁵

⁶¹ Gilboy 1998.

⁶² Kraakman 1986; Gilboy 1997 and 1998.

⁶³ Cruz 1995, p. 3; Nicholson 1997.

⁶⁴ Williamson 1985; for the use of the principal-agent approach concerning carrier sanctions, see also Guiraudon 2001.

⁶⁵ Ayling and Grabosky 2006, p. 422.

The term ‘carrier sanctions’ suggests that *mainly* sanctions are deployed in persuading carriers, however, we must keep in mind that the relationship between the State and the other actors involved might not be one-sided. In her research, Gilboy has shown that complex dependencies can exist between the various parties involved in third-party liability systems in immigration control.⁶⁶ How these relationships develop and take shape, is partly dependent on the extent of the interdependencies between the actors; for example, when carriers are not obliged (by law) to act in a certain way, the relationship between officials and carriers becomes much more of an exchange relationship “in which both actors come to expect *quid pro quo* exchanges”.⁶⁷

This is also supported by Ayling and Grabosky’s study in which they argue that, coercion through ‘command’, unlike the use of physical force, gives citizens – in this case private organisations – choices about the extent of their cooperation.⁶⁸ The State will want to increase the extent of that cooperation as much as possible. Third party liability systems thus can become, depending on the situation, “occasions for mutual dependencies and exchange between public and private entities”.⁶⁹ As we will see below, the financial sanctions imposed on carriers are being supplemented with various instruments and strategies to make sure that carriers indeed perform the control tasks. ‘Monitoring’ mechanisms are operated by governments in order to ‘stimulate’ private transporters to execute their control tasks. We will illustrate this by describing the policy concerning the enforcement of carrier sanctions in the Netherlands.

3.2 *Implementing Carrier Sanctions in the Netherlands*

Legislation

As in other European countries, carriers transporting passengers by air, water or land to the Netherlands are responsible for checking their passengers’ documentation. Passengers without the proper documentation: passport, visa, etc. should in principle not be carried. In the Netherlands, these obligations are laid down in the Aliens Act 2000, the Aliens Decree and the Aliens Regulation as well as in the Aliens Circular which contains the Guidelines for Carriers, and in the Guideline concerning the criminal prosecution of carriers.

Penalties

In case passengers have been brought to the territory and are refused entry into the Netherlands, the carrier can be held responsible for the passengers’ return, for the costs associated with the stay of inadmissibles and finally, the carrier can also

⁶⁶ Gilboy 1997.

⁶⁷ Gilboy 1997, p. 507 (italics added).

⁶⁸ Ayling and Grabosky 2006.

⁶⁹ Gilboy 1997, p. 525.

be fined for not complying with its 'duty of due care'.⁷⁰ The maximum fine in the Netherlands can amount to € 18,500, although in most cases a settlement is offered first of € 3,000 (for first offenders).⁷¹ Sanctions are used to penalise the carrier after the fact. The government however wants to avoid that inadmissible passengers reach the territory. Moreover, the policy has changed the relationship between private transporters and their passengers. The carrier, first the client's servant, has now become the client's adversary.⁷² At the same time the client, which used to be of commercial interest, has been turned into a potential financial threat for the carrier.

Training

In a Memorandum of Understanding (MoU) with KLM the Dutch Government agreed to provide training to KLM's employees concerning the validity and false-ness of documents. If training is indeed provided by the government and how much training is actually arranged in practice, is not completely clear. Apart from agreements on training in MOUs, various EU Member States, including the Netherlands, have deployed Immigration Liaison Officers (ILOs) abroad, especially in 'refugee-producing countries', to "reduce the number of improperly documented passengers travelling from or through that country"⁷³ and to ensure that air carriers comply with the carriers' liability legislation. Since October 1994, the Dutch Government started posting Immigration Liaison Officers who were responsible for intensifying contacts with airlines and immigration authorities; advising embassy personnel; providing training to airline personnel and conducting pre-boarding checks.⁷⁴ The first placements of Dutch ILOs were in Colombo (Sri Lanka), Moscow (Russia) and Accra (Ghana).

ILOs and Pre-Boarding Checks

In relation to the legislation on carriers, Dutch ILOs have the task to support and advise airlines with regard to the validity of the travel documents of their passengers; to provide basic training to airline personnel; and facilitate visits and training by specialists of the Dutch Government.⁷⁵ They do not have the authority to deny passengers access to a flight, they can only 'advise' airlines whether or not to take a passenger on board, based on a check of the travel documents.⁷⁶ The final

⁷⁰ Translation derived from Staples 2000.

⁷¹ Guideline concerning criminal liability for the transportation of undocumented or improperly documented aliens, *Official Gazette* 1995, no. 59, p. 1.

⁷² Ayling and Grabosky 2007, p. 427.

⁷³ 'A code of conduct for Immigration Liaison Officers', IATA/Control Authorities Working Group (IATA/CAWG) C0694/09/02. Immigration Liaison Officers are sometimes also referred to as Liaison Officers (LO) or Airline Liaison Officers (ALO).

⁷⁴ TK 1995–1996, 19 637, no. 170, p. 2.

⁷⁵ TK 1999–2000, 26 732, no. 7, p. 90.

⁷⁶ ACVZ 2003, p. 68.

decision whether or not to carry a passenger lies with the airlines. If airlines flying to the Netherlands act against negative advice from the Liaison Officer, this is reported to the Dutch Royal (Military) Constabulary (KMar), the Border Police at Schiphol Airport.⁷⁷ Subsequently, a gate check will be conducted at the plane's arrival at Schiphol Airport.⁷⁸ In this way, ILOs can influence and control whether or not passengers, whose documentation raises questions, will be admitted to the plane. How exactly the stationing and functioning of ILOs work is not very clear. Although in theory ILOs have an advisory task, it is doubtful whether this is still just 'advice' in practice; negative advice to airlines concerning certain passengers, appears to be almost always followed. According to the Dutch Minister for Aliens Affairs and Integration, ILOs have advised carriers in 3,500 cases in 2004. In over 99% of the cases the advice was followed by airlines.⁷⁹ KLM, the Royal Dutch airline indicates that ILOs can be very helpful in advising carriers on documentation and that today, in many cases ILOs from different countries work together in teams which are available in case an airline asks for assistance. It seems that this is not only a way to control but also to support carriers.

Deploying Airline Liaison Officers has since 1996 also come into practice at the EU level with the adoption of a Joint Action of 14 October 1996, providing for a common framework for the initiatives of Member States concerning liaison officers.⁸⁰ Since this Joint Action, there have been several initiatives to coordinate pre-frontier and to pool means and resources.⁸¹ The creation of a European ILO network was referred to in the European Commission's Communication of November 2001.⁸² Although all Member States agreed on the important role ILOs carry out in the prevention and fight against illegal immigration in the countries of origin and transit, and on the fact that this role should be further increased, no agreement could be reached on streamlining the tasks and definition

⁷⁷ The KMar are responsible for border control at Schiphol. Officials of the KMar have a wide variety of duties. They are responsible for maintaining public order, for guarding members of the Royal Family, crime prevention and also for enforcing the legislation on aliens. Concerning the legislation on aliens they are, among other things, responsible for border control, but also for the reception of asylum-seekers, and expelling failed asylum-seekers and irregular migrants.

⁷⁸ Information to the Parliament by the Dutch Minister for Justice, *TK* 2001–2002, 27 204, no. 15, p. 8.

⁷⁹ *TK* 2004–2005, 29 344 en 19 637, no. 43, p. 7.

⁸⁰ Joint Action 96/602/JHA of 14 October 1996, OJ L 268 of 19 October 1996.

⁸¹ Joint position of the Council of 25 October 1996 on pre-frontier assistance and training assignments (96/622/JHA OJ L 281, 31.10.1996, pp. 1–2); Decision of the Schengen Convention Executive Committee of 16 December 1998 on coordinated deployment of document advisors for air and maritime traffic and at consular representations (SCH/Com-ex (98) 59 rev.); Recommendation from the German Presidency of 26 January 1999 on the establishment of round-the-clock document adviser bureaux at problem airports with alternate participation of all EU member states (Doc. 5529/99); Network of Pre-Frontier Liaison Officers (Doc. 9805/00, 28 June 2000).

⁸² Communication on a Common Policy on Illegal Immigration, COM(2001) 672, 15 November 2001, p. 16.

of ILOs until 2004. According to the European Commission: “a legal basis for such networks would formalise this cooperation and co-ordination by defining their objectives and letting Member States know what information or services can be expected or requested via them”.⁸³

The lack of clarity that existed concerning the tasks and responsibilities of Liaison Officers, is reflected in “A Code of Conduct for Immigration Liaison Officers” that was drawn up in October 2002 by IATA, the International Air Transport Association. This document is concerned with the tasks and deployment of Immigration Liaison Officers. Its goal is to promote consistency of approach and cooperation between Immigration Liaison Officers deployed by Member States overseas.

In February 2004, a Council Regulation was adopted on the creation of an Immigration Liaison Officers network. This Regulation obligates Member States to establish forms of cooperation among ILOs.⁸⁴ It specifies what information should be gathered by ILOs and how they should cooperate, for example they shall “coordinate positions to be adopted in contacts with commercial carriers”.⁸⁵ Most recently, a Common Manual for Immigration Liaison Officers Posted abroad by Member States of the European Union was drafted, which “is intended to be an operational and/or practical tool comprising the best practices and all kind of relevant information useful for the ILOs in order to carry out the common tasks defined in the ILO regulation”.⁸⁶

After the terrorist attacks on the United States and Madrid, many countries swiftly introduced laws aimed at the fight against terrorism. The Netherlands were no exception. The Dutch Government asked the ACVZ⁸⁷ for advice on the relationship between the policy concerning aliens and the fight against terrorism. In their report, the Committee analyzed the role of Immigration Liaison Officers and concluded that this can be considered an efficient way of checking immigrants before they access the carrier.

In Dutch policy, there is a lack of clarity concerning the use of the term ‘pre-boarding checks’. In some cases, this means checks executed by ILOs when assisting airlines, at other times this also means the deployment of KMar officials at an airport abroad, whereby KMar personnel are flown to a specific station for a short period of time after which they return to the Netherlands. According to the

⁸³) Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM (2003) 323 final, Brussels 3 June 2003.

⁸⁴) Council Regulation (EC) no. 377/2004 of 19 February 2004, OJ L 64, p. 1, 2.03.04.

⁸⁵) Council Regulation (EC) no. 377/2004 of 19 February 2004, OJ L 64, p. 1, 2.03.04, Article 4(1), indent 3.

⁸⁶) Draft Common Manual for Immigration Liaison Officers Posted abroad by Member States of the European Union, Council Document 8418/06, 25.04.06.

⁸⁷) Advisory Committee on Aliens Affairs, see note 47.

Dutch Government, in these cases the carrier is assisted in deciding whether or not to transport passengers. Whether or not pre-boarding checks can be executed depends on the authorisation of local authorities.⁸⁸ It is not clear if and how agreements are made with local authorities on pre-boarding checks. In this article, the checks by KMar officials are referred to as pre-boarding checks. Although it is not exactly clear how these pre-boarding checks have worked, this strategy seems to have been deployed mainly on an ad hoc basis to counter certain trends in illegal immigration flows or trends for example where there appears to be an increase in the use of false documentation in a certain airport. In policy documents, it remains unclear if agreements have been made regarding such pre-boarding checks with third countries, and how exactly these checks work. It seems that these pre-boarding checks could support carriers in their control duties.

Gate-Checks

Whereas the posting of ILOs is a way of influencing and supporting carriers, gate-checks are an instrument to 'monitor' their behaviour. Gate-checks of passengers' documents are being conducted by immigration officers immediately after passengers have disembarked the plane or boat at the passenger bridge. That way, undocumented passengers can be directly 'claimed with' the concerning carrier.⁸⁹ This can act as an incentive for transporters to be zealous in their control efforts. Moreover, executing a gate-check ensures that passengers, who are not in possession of proper documentation – for example, because they have been destroyed or gotten rid of in the plane – can still be assigned to a country of origin or transit and to a specific transporter. This means that it is clear for authorities which carrier can be fined, which carrier is responsible for re-transporting the passenger, and to which country.

In the Netherlands, gate-checks have been in use since the 1980s when a penalty system was not yet installed. It is not exactly clear how these gate-checks are operated in practice; whether they are executed randomly or targeted at specific 'risk' flights. According to the Dutch Government, in case advice by an ILO is not followed, this will be reported and a gate-check will be executed at Schiphol Airport.

The practice of gate-checks does not mean that passengers do not need to pass the immigration control desk to have their documents checked once more; gate-checks are supplementary to, not a replacement for immigration controls.

Negotiating Parties I: Memorandum of Understanding

Although the State has the power to control and to sanction, it seems that carriers have not been silent 'victims' of this policy. The relationship between government

⁸⁸) TK 1999–2000, 26 732, no. 7, p. 91.

⁸⁹) The Dutch Government used this terminology.

and carrier is not a one-sided relationship judging from the negotiations and court cases on this issue. One example is the way the Dutch government has been negotiating a Memorandum of Understanding with the Royal Dutch Airline (KLM) since the instalment of the penalty system.

Although a penalty system for carriers had come into force in 1994, it was not until 1 December 1997 that fines were actually imposed on transporters.⁹⁰ The government preferred to prevent carriers from bringing in undocumented passengers based on solid agreements. Imposing fines to reach this objective was considered a remedy of last resort.⁹¹ This changed in 1997.

On 16 February 1997, an airplane from Turkmenistan Airlines landed at Schiphol Airport carrying 173 undocumented Tamil passengers.⁹² Although the phenomenon of undocumented passengers was not new – during the previous three years, about 10,000 undocumented passengers were transported to Schiphol Airport every year, of which about 60 per cent requested asylum⁹³ – this was nonetheless cause for some consternation in the Dutch Parliament.⁹⁴ As a result of this consternation in Parliament and the growing attention regarding inadmissible passengers, the State Secretary of Justice made an inventory of the numbers of inadmissible passengers arriving at Schiphol Airport in 1996, which showed that 55 per cent of the inadmissible passengers arriving at Schiphol Airport wished to claim asylum, of which 74 per cent did not have any travel documentation.

As of 20 October 1997, a trial period started; at the end of this trial period, from 1 December 1997,⁹⁵ carriers acting in breach of their duty of due care would be fined. The first fines were imposed on various airlines. The Dutch Royal Airline had received most of the fines, which was not unexpected since it is the biggest airline flying to and from Schiphol Airport. Between 1 December 1997 and 12 April 1998, more than 4,000 reports were made by the KMar against KLM for transporting undocumented passengers.⁹⁶ These criminal cases were then transferred to the Public Prosecutors Office. The joint cases went to court and were finally decided by the Supreme Court in 2000.⁹⁷ KLM lost the court case and had to pay a fine of approximately 4.5 million Euros. Other airlines that had been fined had accepted settlements. The court case against KLM shows that this carrier did not – at least not in all cases – obediently follow the carrier sanctions regime, by accepting financial sanctions; instead it contested these sanctions and objected to this policy.

⁹⁰ *Aanhangsel TK 1997–1998*, no. 1208, p. 2471.

⁹¹ *Aanhangsel TK 1995–1996*, no. 914, p. 1857.

⁹² *TK 1996–1997*, 25 237, ‘Landing of an airplane from Turkmenistan at Schiphol Airport’, no. 1–3 and *TK 1997–1998*, 19 637 / 25 237, no. 303.

⁹³ *TK 1996–1997*, 25 237, no. 2, p. 1.

⁹⁴ *TK 1996–1997*, 25 386 and 19 637, no. 23. Motion of 26 June 1997.

⁹⁵ *TK 1997–1998*, 19 637, no. 303, p. 8.

⁹⁶ *Aanhangsel TK 1997–1998*, no. 1208, p. 2471.

⁹⁷ Supreme Court LJN AA6456, 112 986, 11 July 2000, *NJ 2002/373*.

Before the court case against KLM had come to an end, the Dutch Government had started talks with KLM to come to an alternative solution. As a result, the Memorandum of Understanding described above, was negotiated and signed in 2000. This MoU came into force on 1 April 2000.⁹⁸ According to the text of the agreement, the intention of the MoU was to achieve the goals of the legislation “as much as this is reasonably possible”. The agreement was signed in order to regulate compliance with the legislation in the first instance with a Memorandum of Understanding, so that criminal prosecution would not need to be used.

In the MoU, it was agreed that KLM would comply with the carrier legislation by checking before every flight whether the passengers were in possession of the proper travel documents. Moreover, the airline agreed to allow, at all times, Dutch officials to advise KLM’s employees at airports of departure when checking documents. Further, it was agreed that KLM would be responsible for making sure that its employees responsible for checking travel documents would have sufficient expertise and knowledge with regard to these travel documents. KLM would also ensure that technical appliances would be available in order to check the relevant documents. The Dutch Government, in turn, would provide training and expertise to KLM employees concerning the recognition of false /falsified documents. In this MoU, targets were also set; a quota was established concerning the numbers of undocumented or inadequately documented passengers that the Dutch airline could carry without being criminally prosecuted. The objective was to diminish the quota for each category every year, eventually the number of ‘inadmissible’ passengers transported by KLM should only be 215 in 2003.

According to the State Secretary of Justice, the Dutch Government signed the Memorandum of Understanding with KLM to increase the ‘duty of due care’ of the airline. The government reasoned that by providing the airline with expertise in recognising false papers, its duty of due care would become more extensive and thus the criminal liability would become greater. By increasing the liability and the expertise of the airline, the government hoped to improve the supervision by carriers of passenger documents,⁹⁹ while for KLM it has served as a way to avoid being fined. The Dutch Government did impose fines on carriers: in 2002, fines were imposed totalling € 560,000.¹⁰⁰ It is not specified which airlines were concerned. In 2004, the KMar sent official reports concerning 1,112 refused passengers to the Public Prosecutors Office. In 2004, the Prosecutors Office offered settlements to 58 airlines concerning their negligence in breaching the duty of due care, totalling € 760,000.¹⁰¹

An agreement was only made with KLM regarding the transport of undocumented passengers, which illustrates the special position of KLM. Other airlines

⁹⁸) TK 1999–2000, 19 637, Annex to no. 502 (Memorandum of Understanding).

⁹⁹) TK 45 3402, 3 February 2000.

¹⁰⁰) TK 2003–2004, 29 344, no.1 Terugkeernota, p. 11.

¹⁰¹) See 5396579/DVB 28 February 2006, p. 19.

have argued before the cantonal court that the Public Prosecutor's Office gives KLM preferential treatment; KLM has not been charged after signing the MoU, while other air carriers that have made the same efforts have been charged. These airlines have further complained that their requested consultation with the Public Prosecutor had not yet been realised. Therefore, these carriers argue that the Public Prosecutor's Office, being aware of these circumstances, should drop the charges against them. The cantonal court dismissed this reasoning arguing that it is up to the Public Prosecutor to decide whether or not arrangements should be made concerning these offences or their prevention. The cantonal court took into consideration that Schiphol Airport is KLM's home base and KLM is the Dutch 'home carrier'. According to the cantonal court, this provides enough justification to apply a different prosecution policy to KLM.¹⁰²

Negotiating Parties II

The previous paragraph demonstrates that KLM and the Department of Justice have engaged in negotiations on the obligations concerning the checking of passengers. That the relationship between the Dutch State and carriers is not one-sided is also illustrated by two other examples. The first is the fact that carriers seem to have been involved in the implementation of the Advanced Passenger Information Directive (2004/82/EC). In the Netherlands, the implementation of this Directive was not completed until July 2007,¹⁰³ while the deadline for transposition was 5 September 2006. The Minister of Justice informed Parliament that implementation was late, partly because of the necessity of deliberation with the carriers involved on the way the passenger data would be transmitted, and the way in which passengers would be informed about the policy.¹⁰⁴ The Minister of Justice did not make clear what exactly was meant by 'deliberation'.

With regard to expulsion policy, air carriers also play a role. Return policies today are made a priority in the migration policy of European States and are regarded as integral parts of migration policy. This means also that here carriers have an important task. The Dutch Government, to implement a successful return policy, is also dependent on the willingness of air carriers to help in expulsions.¹⁰⁵ This provides carriers with an important position in the expulsion process.

¹⁰²) LJN BA2584 and LJN BA2586, 5 April 2007.

¹⁰³) *Srb.* (Official Journal) 2007, 252 and *Srb.* 2007, 283.

¹⁰⁴) *TK* 30 897, 8 February 2007, no. 5, p. 1.

¹⁰⁵) Carriers are responsible for re-transporting those inadmissibles they had brought to the country. However, there are also many expulsions of migrants who did not arrive with a carrier. In many cases these persons will need to be expelled by airplane, making governments dependent on the willingness of airlines to transport those deportees.

4. From Command and Control to Governance?

In this article, we have reflected on the involvement of private carriers in immigration control; focusing on the situation in practice and on the mode of regulation in the Netherlands. Putting immigration control in context influences the kind of regulatory strategy used. The question central in this paper was whether we can discern a shift from command and control regulatory structures to governance.

The focus has been in the first instance on the role of the State as the initiator in the carrier sanctions policy and the carrier as the 'victim' on who the policy is being imposed. From this limited exploration of the carrier liability regime, it has become clear that relationships between actors involved are changing due to the development of this policy.

The term 'carrier sanctions' implies that mainly command and control instruments in the sense of negative sanctions are used in forcing private transport companies to perform the checking of passengers' documentation. The policy, however, is broader. Various characteristics of command and control forms of regulation exist in carrier sanctions policy; there are multiple mechanisms to stimulate (command) and check (control) the actions of the carrier. The carrier sanctions policy in that way constitutes a system of 'contiguous measures', coercing the gatekeeper into mandatory action. In order to solve the principal-agent problem: pre-boarding checks are used to advise, gate-checks to monitor, and sanctions to penalise when, after all, the carrier did not comply. These control measures are a combination between 'hard touch' and 'soft touch' regulation.

Some aspects of the policy signal a shift towards governance. It can be stated that the involvement of actors other than governments alone is already a move towards a more de-centred way of governing. Gilboy's study suggests that complex interdependencies can exist between various actors in third-party liability systems;¹⁰⁶ this is supported by the example of the Memorandum of Understanding which KLM had negotiated with the Justice Department. This has been a delicate process. In the Netherlands, a fine of 4.5 million Euros had been imposed before parties could come to an agreement. In the MoU, agreements were made and structures of deliberation were set up, stimulating forms of cooperation between authorities and the airline. In the case of KLM, therefore, the carrier sanctions policy has developed from a command and control type of regulation towards a form of governance in which there is much cooperation and deliberation, although sanctions can still be imposed. The question remains whether this move toward governance can also be discerned in dealings with other airlines.

Government regulation concerning carrier sanctions seems to be hybrid. The carrier sanctions policy in the Netherlands constitutes a combination of hard and

¹⁰⁶ Gilboy 1997.

soft touch regulations; a combination of advising, monitoring, training, negotiating and sanctioning. Both a command and control approach and a governance approach can be discerned. Besides using these mechanisms, the Dutch State itself is still executing border controls supplementary to the controls executed by carriers. In short, the Dutch Government has not moved from rowing to steering but instead is doing part of the rowing *and* the steering.

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